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October 9, 2009

John Robertus
Executive Officer
Attn: Mike Porter, Engineering Geologist
Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Comments on the Application for Certification Under Section 401 of the Federal Clean Water Act Submitted by Gregory Canyon, Ltd. - File No. 09C-073.

Dear Mr. Robertus:

These comments are respectfully provided on behalf of the Pala Band of Mission Indians in response to the Section 401 application described above for the proposed Gregory Canyon landfill. We note that these comments are provided on the application even though the Regional Board itself notified Gregory Canyon, Ltd. ("Applicant") in a letter dated September 28, 2009, that the Section 401 application was incomplete.

Given that a complete application has not yet been submitted, the Pala Band requests that the Regional Board allow additional comments to be provided on the application once the Regional Board acknowledges that a complete application has been submitted. The Regional Board's own guidance states that public comments "will be accepted on a pending 401 application until an action is taken." That guidance also states that the certification will not be approved "within the 21-day comment period unless the project is an emergency and time is of the essence." Neither of those considerations applies here.

As you know, the Regional Board previously was scheduled to consider the Section 401 certification as part of its consideration of Tentative Order No. R9-2009-

0004, which also included the draft Waste Discharge Requirements for the proposed landfill. Consideration of the Order was to occur during a regularly scheduled Regional Board meeting. Numerous public comments were submitted opposing issuance of the Order.

The Regional Board properly chose to address the WDRs and the Section 401 certification at a public hearing, and it should not reverse its position on that issue now. Other than denying the Section 401 certification because there is no valid Section 404 permit application (as discussed below) or for any other reason, any action on the Section 401 certification should not occur until the application is considered at a regularly scheduled meeting of the Regional Board. A public hearing on the issue would be proper given the historic and widespread opposition to the proposed landfill.

I. It is Premature for the Regional Board to Consider the Section 401 Application.

A. No Valid Section 404 Application is Pending.

The first problem with the Section 401 application is that there is no valid application pending for a Section 404 permit under the Clean Water Act. The Regional Board's obligations under Section 401 arise only if there is a valid permit application under Section 404.

The Regional Board's website indicates that the "pending" Section 404 application for a Nationwide Permit ("NWP") for the proposed project is dated September 21, 2005. That being the case, the 2005 application was based on NWPs issued by the Army Corps of Engineers ("Corps") on January 15, 2002.

But, the 2002 NWPs expired on March 18, 2007. The Corps' rules require that an NWP be reissued within five years or it "automatically expires and becomes null and void." When that time period expires, activities "which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation." 33 C.F.R. § 330.6(b). Accordingly, the Corps stated in its notice titled "Reissuance of the Nationwide Permits" that "activities authorized by the current NWPs issued on January 15, 2002 that have commenced or are under contract to commence by March 18, 2007, will have until March 18, 2008, to complete the activity under the terms and conditions of the current NWPs." 72 Fed. Reg. 11092 (March 12, 2007).

This means that, even if the Applicant had obtained an NWP for the proposed landfill prior to the date the 2002 NWPs expired, it would have had to complete the work authorized by the NWP by March 18, 2008. The fact is that the Applicant did not receive an NWP, but merely had filed an application for coverage under the 2002 NWPs. Because those 2002 NWPs no longer exist, the current 2005 application is invalid. Until the Applicant files a new Section 404 permit, the Regional Board has no obligation or authority to consider a request for certification under Section 401.

B. There is No Existing Jurisdictional Determination for the Proposed Project.

Even if the application was not void, it still would be premature for the Regional Board to consider certification. The Regional Board's September 28, 2009, letter finding the application incomplete states that the Applicant is seeking Section 401 certification only for the proposed bridge over the San Luis Rey River. That bridge is needed to construct and operate the proposed landfill. The Section 401 application is limited to an NWP for the bridge because in October of 2004 the Corps reversed its previous decision and concluded that the creek in Gregory Canyon was not a "water of the United States." Based on that determination, a Section 404 permit was not required to construct the proposed landfill footprint itself.

But the Corps' determination that the creek in Gregory Canyon is not a "water of the United States" expired on October 6, 2009. The Corps now must complete a new jurisdictional determination. Until that jurisdictional determination is completed, the Regional Board cannot act on the Section 401 certification. A determination that the creek in Gregory Canyon is a water of the United States would require the Applicant to obtain an individual permit under Section 404 for the entire project, including the bridge. Processing a Section 401 certification now for construction of the bridge alone is unnecessary and premature.

C. The Section 404 Permit Application Contains Erroneous Information.

Even if the 2005 Section 404 permit application had not expired, the application itself contains erroneous information that makes it invalid and consideration of Section 401 certification premature. Specifically, under General Condition 12, the Section 404 application claims that the "project will not affect such historic properties." General Condition 12 prohibits any activity which may affect a historic property "listed, or eligible for listing, in the National Register of Historic Places" until the Corps' district

engineer "has complied with the provisions of 33 CFR. part 325, Appendix C." That is a reference to the Corps' regulation implementing the National Historic Preservation Act ("NHPA").

There is no argument that Gregory Mountain, which forms the east flank of Gregory Canyon, is eligible for listing in the National Register of Historic Places. The California State Historic Preservation Office has made that determination, and the listing currently is being processed by the federal government. There also is no argument that the Corps has not conducted consultation on the proposed under Section 106 of the NHPA as required by that law and the Corps' rules.

The basis for the Applicant's claim that no historic properties will be impacted is unknown. But the Applicant either is being intentionally misleading or is misapplying the law by arguing that only impacts on historic properties caused by the actual fill activity related to the proposed construction of the bridge need to be considered. That is not the way the Corps' rules address the issue.

The Corps' rules state that an NWP cannot be issued for an any "activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places . . . until the [District Engineer] has complied with the provisions of 33 C.F.R. Part 325, Appendix C." 33 C.F.R. Part 330.4(g) (emphasis added). The rules also state that an activity "may affect" a historic resource if the activity causes the "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" or if the activity "may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 33 C.F.R. Part 325, App. C, No.15. All of these "adverse effects" would occur if 30 million tons of garbage was buried on the side of sacred Gregory Mountain.

Critically, the Corps' rules define the "permit area" under the NWP program to include "uplands directly affected as a result of authorizing the work or structures." 33 C.F.R. Part 325, App. C.1.g. These upland areas are considered to be part of the "permit area" if the activity in the upland area (1) "would not occur but for the authorization of the work or structures within the waters of the United States," (2) is "integrally related to the work or structures to be authorized," and (3) is "directly associated (first order impact) with the work or structures to be authorized." *Id.* Because the proposed bridge would provide the only means of access to the proposed landfill footprint (and would provide access only to the proposed landfill footprint), the "permit area" under the Clean Water Act includes Gregory Canyon and Gregory Mountain.

Given this situation, the Applicant's claim that no historic properties will be affected is false. Consultation under the NHPA must involve the entire impact area, including Gregory Mountain.

In addition, under the Corps' rules, if an activity within the "permit area" will adversely affect a historic property, the Corps may properly require an individual permit. 33 C.F.R 330.4(g)(2)(ii). The fact that the proposed landfill would cause unmitigable impacts to sacred Gregory Mountain is another reason why the Corps should require an individual Section 404 permit.

II. The Application Does Not Provide Sufficient Information for the Issuance of Section 401 Water Quality Certification Requirements.

Even if these factors did not make consideration of the Section 401 certification application premature, the missing information identified by the Regional Board in its September 28, 2009, letter would. But even that list of significant deficiencies misses some of the major problems with the application.

For example, Item 4 of the Regional Board's letter requests a better description of the "type of drilling that will be done, potential sources of pollutants from that drilling method, seasonal staging of the drilling operation and pier construction relative to the rainy or monsoon season, and if coffering will be used." However, the information provided in the sections of the 401 application titled "Description of Activity", the "Avoidance and Minimization of Impacts" and the "Protection of Water Quality" does not fully describe any of the methods that will be used for drilling let alone for all of the bridge construction. For the application to be complete, an applicant is required to provide detailed descriptions of all of the listed activities and citations to specific page numbers in any documents referenced in the application (for example, the Joint Technical Document ("JTD") or the Final Environmental Impact Report ("FEIR")). Because the Applicant has failed to provide the required information, it is impossible to provide proper comments on the application.

The application also fails to describe the various stages of the proposed construction activity so that associated water quality impacts can be evaluated. The application should clearly explain how the Applicant would avoid exceeding Basin Plan limits for total dissolved and suspended solids, turbidity, inorganic chemicals, and oil and grease. There currently is not sufficient information to assess that issue because there is no time frame provided for when each phase of the proposed construction would occur (during the rainy season etc.) and how potential impacts to water quality during each

phase would be limited. That is the minimum information that must be provided. The Applicant also does not identify where construction staging areas would be located or indicate how the south side of the river would be accessed prior to construction of the bridge.

We agree with the Regional Board's rejection of the Applicant's proposal that it provide a construction Storm Water Pollution Prevention Plan ("SWPPP") to the Regional Board "at the appropriate time." Now is the time for the Applicant to identify and the Regional Board to consider the potential impacts from the proposed construction activity to determine what necessary requirements must be imposed if a water quality certification were to be issued. Also, any existing construction-related SWPPP must be revised to address the new storm water standards recently adopted by the State Water Resources Control Board (Order No. 2009-0009-DWQ).

A. More Information is Needed Concerning the Proposed Use of the Low-Flow Crossing.

The Applicant and the Regional Board also refer to the existing "low-flow" crossing, which historically was located downstream of the location for the proposed bridge at Wild Road. The FEIR for the proposed landfill stated that construction equipment and construction deliveries would use this low-flow crossing to access the proposed landfill site prior to construction of the bridge, and apparently for construction of the bridge as well.

Our understanding, however, is that the low-flow crossing was damaged during storms in 2005. Subsequently, the Applicant notified the Corps that the Applicant intended to "repair" the crossing, and claimed that work in the river was exempt from Section 404 permitting requirements as an emergency repair. It is unknown if any repairs were made.

The claim that the repairs would have been exempt from Section 404 permitting as an emergency was wrong because there is no evidence that the original low-flow crossing structure (1) had been properly permitted under the Clean Water Act (or under state law through a Streambed Alteration Agreement ("SAA")), (2) that the new use of the low-flow crossing to allow construction of the proposed landfill was similar to the previous minor use of the crossing for farming, (3) that the "emergency" repairs had been begun within a reasonable time after the alleged damage occurred, or (4) that the proposed "repairs" would not significantly change the design of the previously existing crossing. Consequently, if any "repairs" were made to the crossing without a Section 404 permit,

they should be considered to have been in violation of Section 404. In addition, such action would have violated Section 401 and the requirement to obtain a SAA.

We also note that the low-flow crossing is within federally designated "critical habitat" for the endangered southwestern arroyo toad, and the road on the south side of the river that it accesses also is in federally designated "critical habitat" for the arroyo toad and the endangered least Bell's vireo. If the low-flow crossing is to be used to allow construction of the bridge, the Section 401 application should identify any needed improvements to the crossing or the south-side road and how impacts to endangered species will be avoided or permitted. If the low-flow crossing will not be used, the application should describe how the south side of the river will be accessed.

III. The Section 401 Certification Must Consider the Impacts of the Activity Allowed, Not Simply the Fill Activity.

A Section 401 certification must "set forth any effluent limitations and other limitations and monitoring requirements necessary to ensure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations under Section 1311 or 1312 of this title ... and with any other appropriate requirement of state law set forth in such certification...." 33 U.S.C. § 1341(d). Under Section 401(d), the Regional Board can impose "'other limitations' on the project in general to assure compliance with the various provisions of the Clean Water Act and with 'any other appropriate requirement of state law,'" and "additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 711, 712. Under Section 401, "*activities* – not merely discharges – must comply with state water quality standards." *Id.*. at 712.

For purposes of Section 401 certification, the State Water Resources Control Board defines the term "activity" as "any action, undertaking, or project – including, but not limited to, construction, operation, maintenance, repair, modification, and restoration – which may result in any discharge to waters of the United States in California." 23 C.C.R. § 3831(a). The "activity" that the Regional Board is certifying here is not simply the discharge of fill into the San Luis Rey River but, at the least, the construction *and operation* of the bridge.

More appropriately, the "activity" at issue for purposes of Section 401 certification is the construction and operation of the proposed landfill itself because the bridge has no independent utility. That means that the Regional Board must impose requirements that

would ensure the protection of the identified beneficial uses of the San Luis Rey River (agriculture, industrial, municipal and domestic, cold and warm freshwater habitat, contact and non-contact water recreation, and wildlife habitat). Those requirements cannot be determined without a more-complete description of the impacts of the construction and operation of the bridge and the proposed landfill itself.

The application also fails to provide sufficient information regarding "past/future impacts" which requires that information be provided on activities that "may impact the same water body." The application states, with emphasis added, there are no applicable projects "that would result in effects on the river *that would be related to the bridge.*" That is not the information that the application requires, and the answer provided is simply non-responsive. That is another reason why the application is incomplete.

IV. The Validity of the Revised FEIR Remains in Question.

The September 2009 letter from the Regional Board indicates that it considers there to be a certified Final Environmental Impact Report for the proposed landfill project under the California Environmental Quality Act ("CEQA"). While there technically is an RFEIR, the Regional Board should be aware of two facts.

First, an appeal is pending in the Fourth District Court of Appeals challenging the adequacy of the RFEIR. Among other claims, that appeal challenges the failure of the RFEIR to analyze the impacts to water quality caused by (1) the proposal to pump groundwater from point-of-compliance groundwater monitoring wells for daily use on the site, and (2) the fact that sampling data for on-site groundwater showed the presence of contaminants (methylene chloride and antimony) above their respective maximum contaminant levels. Both these issues involve matters directly within the Regional Board's area of expertise.

Second, the main source of water for the proposed landfill identified in the RFEIR was recycled water from the Olivenhain Water District ("OMWD"). Since the RFEIR was certified, however, OMWD has been ordered by the court to rescind its agreement to sell recycled water to the Applicant, and OMWD has notified the Applicant that it will not sell water for the project in the future. Consequently, there is no assured water supply for the project. Although the Applicant has identified some alternative sources of water for the proposed landfill, the environmental impacts of obtaining water from those sources has not been evaluated. That means that there is not an adequate FEIR on which the Regional Board can rely.

V. Conclusion

The facts clearly show that the Regional Board cannot process the Section 401 application because there is no valid Section 404 permit application or valid jurisdictional delineation for the entire project. Until those two threshold issues are resolved, and the information in any application is complete enough for the Regional Board to properly assess the impacts of the proposed project, it is premature for the Regional Board to consider the Section 401 certification.

The Regional Board is considering a proposed project that would desecrate sites sacred to members of the Pala Band and numerous other Tribes, and threaten water quality at a time when water supplies are becoming scarcer. If approved, the proposed landfill would be the lasting legacy of this Regional Board. The Pala Band urges the Regional Board to reject any request for a Section 401 certification or for any other approval for the proposed landfill.

Sincerely,

Walter E. Rusinek

cc: Robert Smith, Chairman of the Pala Band of Mission Indians
Lenore Lamb, Director, Pala Environmental Services
Mr. James Fletcher, Superintendent, Bureau of Indian Affairs, Southern California Agency
Ms. Alexis Strauss, United States Environmental Protection Agency, Region IX
Mr. Jim Bartel, United States Fish & Wildlife Service
Mr. Darrin Thome, Deputy Assistant Director, Ecological Services Program, United States Fish & Wildlife Service
Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Teresa O'Rourke, United States Army Corps of Engineers
Mr. Mark Leary, Executive Director, Integrated Waste Management Board
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Mr. Jim Wood, Mayor, City of Oceanside
Mr. Bud Lewis, Mayor, City of Carlsbad
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